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## "FRESH CASH"—ANOTHER ELEMENT OF A BANKRUPT'S "FRESH START"?

R. LEWIS TOWNSEND\*

*The author reviews the roots of the "fresh start" concept in bankruptcy law and analyzes its application, through use of the "fresh cash" theory, as a factor in the search for a proper measure of damages in a section 17 (a) (2) false financial statement case.*

The 1970 Amendment to the Bankruptcy Act<sup>1</sup> has prompted new developments in the implementation of a consumer bankrupt's discharge. Perhaps the time is approaching when there will no longer be a consumer false financial statement exception to dischargeability for a specific debt.<sup>2</sup> This exception to the dischargeability

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\* Bankruptcy Judge, S.D.N.Y. [Poughkeepsie, N.Y.] since 1963.

1. Bankruptcy Act §§ 14, 11 U.S.C. §§ 32,35 (1970).

2. The Bankruptcy Act distinguishes between general discharge with respect to all of the insolvent's debts § 14(c)(3), 11 U.S.C. § 32 and dischargeability of a specific debt § 17(a)(2), 11 U.S.C. § 35(a). Professor Schuchman explains that:

Prior to the 1960 amendment to the National Bankruptcy Act, a creditor who claimed that his loan was procured by the debtor's fraudulent misrepresentations had two methods of avoiding the adverse effect of a discharge in bankruptcy. He could raise the issue of fraud at the bankruptcy proceeding, and if he demonstrated that the insolvent had made a "materially false statement in writing" in the course of negotiating a loan, the bankruptcy referee was required by section 14(c)(3) to refuse to grant a discharge with respect to all of the insolvent's debts. Alternatively, he could refrain from raising the issue of fraud at the bankruptcy proceeding and bring a simultaneous or subsequent collection suit in a state court. Under section 17a(2) a creditor could avoid the bar of the discharge in bankruptcy as to any debt that he could prove was obtained "by false pretenses or false representations."

Schuchman, *Impact Analysis of the 1970 Bankruptcy Discharge Amendments*, 23 STAN. L. REV. 735, 739-40 (1971).

The 1960 amendment to the Act removed the false financial statement as a ground for objecting to the general discharge in bankruptcy of a non-business debtor. See text accompanying notes 30-31 *infra*. However, a section 17(a)(2) claim is still available to creditors of a consumer bankrupt.

Section 17(a)(2) would be eliminated by either of the two proposed Bankruptcy Acts presently before Congress. PROPOSAL OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. 31 & S. 236, 94th Cong., 1st Sess.; PROPOSAL OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES, H.R. 32 & S. 235, 94th Cong., 1st Sess.

Section 4-506 of H.R. 31 [S. 2362], the proposed dischargeability section, is substantially the same in both the Judges' bill and the Commission's bill, except the Commission has removed the consumer financial statement exception to dischargeability because of "substantial evidence of abuse of this section by creditors." See Schuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 STAN. L. REV. 735 (1971); Schuchman, *Impact Analysis of the 1970 Bankruptcy Discharge Amendments*, 51 N. CAR. L. REV. 233 (1972). "However, it must be noted that in practice the Judges have limited the use of the false financial statement exception by quickly developed case law. Today, the spectre of these cases clogging the docket has vanished with the requirement of clear and convincing evidence and the limitation of

of a debt runs counter to rehabilitation (often referred to as a "fresh start") which is one of the expressed two-fold designs of the Act.

The purpose of this article is to explore the nature of the "fresh start" concept in the development of bankruptcy law and to analyze the role this concept should play in determining the proper measure of damages in a false financial statement case. The new opportunity principle is not novel to case law. "Provisions for the discharge of a debtor from his debts are of ancient origin. However, the discharge feature was not incorporated into the English Bankruptcy Laws until they had been in existence for two hundred and fifty years."<sup>3</sup>

The origin of bankruptcy law in the United States forms an important and logical platform from which to explain the evolution of the "fresh start" philosophy. Although all of the Bankruptcy Acts of this country have had some provisions allowing discharge of the bankrupt, the development of the bankruptcy law here strongly indicates that the original purpose of the Acts was not the debtor's discharge, but rather the liquidation and distribution of his estate. However, in more recent times the discharge features of bankruptcy proceedings have become of great importance. One of the advantages arising from the opportunity to be discharged from debt has been described as follows: [f]or the honest debtor, be he low salaried wage earner or entrepreneur, a discharge provides him with the incentive to use his skills and talents, and thereby contribute to society even after financial disaster."<sup>4</sup>

Under the law of 1800 the only debts which were recognized as being excepted from the operation of a discharge were those owing to the United States or any of the states.<sup>5</sup> The Act of 1841, however, excepted fiduciary obligations also,<sup>6</sup> while the Act of 1867 further designated fraudulent debts as unaffected by a discharge.<sup>7</sup>

As early as 1904, in a dischargeability proceeding under the Act of 1898,<sup>8</sup> the United States Supreme Court characterized a "fresh start" as one of the stated purposes for which systems of bankruptcy are designed.<sup>9</sup> Nine years later, this same phrase was used by the Court<sup>10</sup> in describing what it later denominated as the bankrupt's

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damages to the 'fresh cash.'" Dilenschneider, *A Close Look at the Proposed Discharge Provisions*, 50 AMER. BANKR. L.J. 107, 114 (1976).

3. COLLIER ON BANKRUPTCY, 1260.1 *et seq.* (14th ed. 1943).

4. *Id.* at 1260.2.

5. Act of April 4, 1800, 2 Stat. 19, ch. 19, § 62.

6. Act of August 19, 1841, 5 Stat. 440, ch. 9, §§ 1 & 4.

7. Act of March 2, 1867, 14 Stat. 517, ch. 176, § 33.

8. 30 Stat. 544, ch. 541.

9. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

10. *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).

"new opportunity in life and clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."<sup>11</sup>

The Supreme Court in *United States v. Kras*,<sup>12</sup> made it clear that the bankrupt's right to a discharge of his debts is a legislatively created benefit and not a constitutional guarantee. Petitioner Kras had challenged the constitutionality of the statutory filing fee requirements of the Bankruptcy Act as a violation of his fifth amendment rights to due process and equal protection. The Court refused to define the right to a discharge as a "fundamental" interest which would require the government to come forth with a compelling interest before it could be regulated. Neither did the Court find that a bankruptcy discharge involved the suspect criteria of race, nationality, or alienage. Rather, the Court found that the Bankruptcy Act falls in that area of legislation which Congress may regulate with only rational justification as the test for its constitutionality.

[B]ankruptcy legislation is in the area of economics and social welfare. [court's footnotes omitted] This being so, the applicable standard, in measuring the propriety of Congress' classification, is that of rational justification. *Fleming v. Nestor*, 363 U.S. 603, 611-612 (1960); *Dandridge v. Williams*, 397 U.S., at 485-486; *Richardson v. Belcher*, 404 U.S., at 81.<sup>13</sup>

The Court did not reject the "fresh start" concept in bankruptcy proceedings but held that the bankrupt's right to such a start could be made conditional on payment of a filing fee. The Court found sufficient justification for the filing fee in the legislative history surrounding the 1946 amendment<sup>14</sup> which abolished the pauper petition and set up the present filing fee system. Petitioner Kras had not been denied due process or equal protection by being required to pay a filing fee.

While the right to a discharge in bankruptcy may not be constitutionally guaranteed, it is an integral part of the Bankruptcy Act and its various provisions must be read with the "new chance in life" purpose and intent in mind.<sup>15</sup> Bankruptcy courts must exercise their powers so that "substance will not give way to form" and "technical considerations will not prevent substantial justice from

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11. *Lines v. Frederick*, 400 U.S. 18, 20 (1970). See also *Kokoszka v. Belford*, 147 U.S. 642 (1974); *Segal v. Rochelle*, 382 U.S. 375, 380 (1965); *Harris v. Zion's Sav. Bank & Trust Co.*, 317 U.S. 447, 451 (1943); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915).

12. 409 U.S. 434 (1973).

13. *Id.* at 446.

14. Act of June 28, 1946, Pub. L. No. 463, 60 Stat. 323, 326.

15. *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

being done."<sup>16</sup> Exceptions to the operation of a discharge should be confined to those clearly expressed in the Act.<sup>17</sup> The Bankruptcy Act must be liberally applied toward the bankrupt seeking a discharge<sup>18</sup> and construed strictly against the objectors for the purpose of carrying into effect the legislative intent.<sup>19</sup>

The fervor with which one court sought to emphasize the importance of the opportunity for a new life is reflected in its finding "that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and [to] restore him to business activity, in the interest of his family and the general public, is one of the main, if not the most important, objects of the [bankruptcy] law."<sup>20</sup>

Judicial recognition of the "fresh start" doctrine has surfaced in several divergent areas of bankruptcy administration. In several of these cases the courts have had to resolve apparent conflicts between the dual purposes of the Act. A brief discussion of these cases will show how the courts have variously extended and limited the "fresh start" concept when faced with legitimate claims that certain debts should or should not be excepted from discharge.

In *Wetmore v. Markoe*,<sup>21</sup> a wife's divorce action resulted in awarding her custody of three children, together with alimony and educational allowances. The husband thereafter filed a bankruptcy petition and sought a state court writ to restrain collection of arrears of alimony and allowances, as being a debt discharged in bankruptcy. The Court refused to extend the "fresh start" doctrine to include the alimony and educational allowances, holding that they were not a "debt" within the meaning of the Bankruptcy Act. The Court would not find, in the absence of explicit statutory language, that Congress intended for the bankrupt to be able to avoid his obligations to support his family through a discharge in bankruptcy.

Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively re-

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16. *Pepper v. Litton*, 308 U.S. 295, 305 (1939).

17. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915).

18. *In re Keisler*, 278 F. 618, 619 (2d Cir. 1922).

19. *In re Leichter*, 197 F.2d 955, 959 (3d Cir. 1952), cert. denied sub nom. *Dovorsky v. Leichter*, 344 U.S. 914 (1953).

20. *Hardie v. Swafford Bros. Dry Goods Co.*, 165 F. 588, 591 (5th Cir. 1908), cited in *Shelby v. Texas Improvement Loan Co.*, 280 F.2d 349, 355 (5th Cir. 1960).

21. 196 U.S. 68 (1904).

quired by direct enactment the court should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children.<sup>22</sup>

The "fresh start" doctrine was used by the Court in *Lines v. Frederick*,<sup>23</sup> to support its decision that a bankrupt's vacation pay, accrued but unpaid at the time of filing the petition, was not "property" under section 70(a)(5) of the Bankruptcy Act and therefore did not pass to the trustee in bankruptcy. The trustee had argued that the Court's decision in *Segal v. Rochelle*,<sup>24</sup> compelled a finding that the vacation pay was property within the meaning of the Act. *Segal* had involved the question of whether loss-carryback tax refunds arising out of business losses immediately prior to bankruptcy but not collected until the calendar year ended were subject to turnover to the trustee. The Court concluded that the tax refund was "sufficiently rooted in the bankrupt's past and so little entangled with the bankrupt's ability to make an unencumbered fresh start" that it should be regarded as property under section 70(a)(5).<sup>25</sup> The Court noted that the main thrust of section 70(a)(5) is to secure for creditors everything of value the bankrupt may possess and that to fulfill this purpose the term "property" is to be construed generously. However, the most important consideration in limiting the breadth of the definition lies in the basic purpose of the Bankruptcy Act: to give the debtor a new opportunity in life.<sup>26</sup>

Unlike *Segal*, which involved an asset arising out of the operations of the bankrupt's business, the function of the vacation pay in *Lines* was to support petitioner's family during a brief vacation or in the event of a layoff. To allow the trustee to collect the vacation pay would force petitioner to either take a vacation without pay or forgo one altogether. In either event, the Court felt that petitioner's chance at a "fresh start" would be severely hampered if denied his vacation pay and held that it did not pass to the trustee in bankruptcy under section 70(a)(5).

The Second Circuit in *Kokoszka v. Belford*,<sup>27</sup> qualified the availability of the new life when it held that "permitting a bankrupt to retain his tax refund would not be giving a 'fresh start' to accu-

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22. *Id.* at 77.

23. 400 U.S. 18 (1970).

24. 382 U.S. 375 (1965).

25. *Id.* at 380.

26. 400 U.S. 18, 20 (1970).

27. 479 F.2d 990, 995 (2d Cir. 1973), *aff'd*, 417 U.S. 642 (1974).

multate new wealth, but a 'head start' over others who had no such refund." Similarly, in *Richardson v. United States*,<sup>28</sup> the court concluded that: "To allow a taxpayer to receive the benefit of an unused net operating loss carryover would be affording him a head start rather than a fresh start. This is more than Congress intended to give him."

The Supreme Court declined to extend the "fresh start" doctrine in *Bruning v. United States*<sup>29</sup> when it held that postbankruptcy interest on tax claims survived as a personal liability of the bankrupt even though such interest could not be collected from the assets of the bankrupt estate. The Court examined section 17 of the Act and commented that it was not a compassionate section for debtors, but rather that it demonstrated Congressional judgment that certain problems (those of government financing in this instance) override the value of giving the debtor a wholly fresh start. Congress clearly intended personal liability for unpaid taxes to survive a discharge in bankruptcy, and since interest is an integral part of a continuing debt, the bankrupt is also personally liable for post-petition interest on taxes which survive bankruptcy.

Recognition of the "new opportunity" principle is also found in recent amendments to the Bankruptcy Act. The 1960 Celler Amendment<sup>30</sup> removed the false financial statement as a ground for objecting to the discharge in bankruptcy of the non-business bankrupt. The Senate Report on the bill reasoned that "a complete denial of discharge is too severe a penalty for the individual non-commercial bankrupt."<sup>31</sup> The hearings on the bill disclosed the practice of unscrupulous lenders condoning and even encouraging the issuance of statements omitting debts with the deliberate intention of obtaining false statements for use in the event the borrower subsequently went into bankruptcy.

The Report points out that while the amendment retains the effect of a false statement on the bankrupt engaged in business, where a false statement may result in a nondischargeable debt under section 17(a)(2)

the businessman is more likely to be aware of the severe consequences to him of issuing a false financial statement. His ordinary business records enable him to produce a more accurate

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28. 386 F. Supp. 424, 429 (C.D. Cal. 1974).

29. 376 U.S. 358 (1964).

30. Act of July 12, 1960, Pub. L. No. 86-621, 74 Stat. 408.

31. S. Rep. No. 1688, 86th Cong., 2d Sess. 2 (1960).

statement than a householder who may have a multitude of small debts and no records.<sup>32</sup>

The 1966 Amendment to section 17(a)(1) of the Act<sup>33</sup> made dischargeable in bankruptcy, with certain qualifications, debts for taxes which became legally due and owing more than 3 years preceding bankruptcy. Prior thereto, debts for taxes were not affected by a discharge. The House Report<sup>34</sup> reflects Congressional concern with the adverse effects of accumulated taxes on the debtor's ability to get a "fresh start." "[C]onsistency with the rehabilitary purpose of the Bankruptcy Act, as well as fairness to individuals, demands some time limit upon the extent of taxes excepted from discharge."<sup>35</sup> The report concluded that as a result of the amendment "it will become feasible for an industrious debtor to re-establish himself as a productive and tax paying member of society."<sup>36</sup>

Thus it can be seen that both Congress and the judiciary have incorporated into the Bankruptcy Act the idea of giving every bankrupt a chance at a new start in life through a discharge of his debts.

One of the more recent applications of "fresh start" pertains to section 17(a)(2) dischargeability; specifically, the "fresh cash" limitation of damages in a false financial statement case.<sup>37</sup>

Prior to 1960 the state courts were divided on the proposition of whether a lender was entitled to secure a judgment for the entire amount of an indebtedness where he renewed or extended an existing indebtedness and at the same time advanced new money in reliance upon a false financial statement. Many courts so held.<sup>38</sup> Other courts, however, took the view that an extension or renewal of an existing indebtedness did not constitute obtaining either money or property within the meaning of section 17(a)(2) and confined the lender's judgment to the amount of the fresh cash advanced.<sup>39</sup>

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32. *Id.* at 2-3.

33. Act of July 5, 1966, Pub. L. No. 89-496, 80 Stat. 270.

34. H.R. Rep. No. 687, 89th Cong., 1st Sess. (1966).

35. *Id.* at 3.

36. *Id.*

37. This problem arises when a debtor, who has an outstanding loan on which he is making payments, obtains a new loan from the same creditor evidenced by a new note which represents the remainder of the old indebtedness plus the new advance. If the financing statement for the new note contains a material omission, and the debtor later petitions for bankruptcy, the creditor will claim that the total indebtedness should be excepted from discharge while the debtor will claim that only the new advance, or the "fresh cash" should be nondischargeable.

38. See *In re Waite*, 223 F. 853 (D. Md. 1915); *C.H.F. Fin. Co. v. Jochum*, 127 So. 2d 534 (La. 1961); *Beneficial Fin. Co. v. Norton*, 185 A.2d 218 (N.J. 1962); *First Credit Corp. v. Wellnitz*, 21 Wis. 2d 18, 123 N.W.2d 519 (1963).

39. See *Personal Fin. Co. v. Murphy*, 53 So. 2d 421 (La. App. 1951); *Household Fin.*



After the 1960 amendment, state courts consistently held that when a lender consolidates an existing obligation with a new advance, the entire obligation is nondischargeable if the new money or "fresh cash" was obtained by fraud as described in section 17 (a) (2).<sup>40</sup>

However, state law is no longer controlling since the 1970 dischargeability amendment. The newly added section 17(c)<sup>41</sup> gives the federal courts exclusive jurisdiction to determine dischargeability under section 17(a)(2). Viewed in its proper perspective, the bankruptcy court is now "the exclusive forum for developing federal standards uniform and national in application" for its interpretation "and is not bound by decisions of the courts of the state in which the bankruptcy court sits."<sup>42</sup> An example of the salutary effect of this provision is that it will allow a federal district court in Wisconsin to disregard the contradictory decisions of the Wisconsin Supreme court in *Household Finance Corp. v. Christian*,<sup>43</sup> and *First Credit Corp. v. Wellnitz*.<sup>44</sup>

By vesting the federal courts with unfettered jurisdiction to interpret and apply the Act, and more importantly, to determine the measure of damages for dischargeability under section 17(a)(2), a uniform national interpretation of the Bankruptcy Act, "consistent with the equitable framework of proceedings in bankruptcy,"<sup>45</sup> is now in prospect.

Federal courts have had several occasions to pass upon this issue. However, as District Judge Carter stated in *In re Ellis*:<sup>46</sup> "Unfortunately, the federal courts have not fared much better than the state courts in their attempt to achieve uniformity. Courts in this circuit [Second] also have gone their separate ways when this issue

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Corp. v. DeShazo, 359 P.2d 1044 (Wash. 1961); *Household Fin. Corp. v. Christian*, 8 Wis. 2d 53, 98 N.W.2d 390 (1959).

40. See *Seaboard Fin. Co. v. Barnes*, 378 Mich. 627, 148 N.W.2d 756 (1967); *Family Fin. Corp. v. Lyons*, 62 Misc. 2d 985, 310 N.Y.S. 2d 514 (Sup. Ct. 1970); *Federal Fin. Co. v. Merkel*, 397 P.2d 436 (Wash. 1964); *First Credit Corp. v. Wellnitz*, 21 Wis. 2d 18, 123 N.W.2d 519 (1963).

41. Act of Dec. 18, 1970, Pub. L. No. 91-467, 84 Stat. 992; 11 U.S.C. § 35(c)(1) (1970).

42. Lee, *Leading Case Commentary*, 46 AM. BANKR. L.J. 245, 251 (1972).

43. 8 Wis. 2d 53, 98 N.W.2d 390 (1959).

44. 21 Wis. 2d 18, 123 N.W.2d 519 (1963). See also *In re Barlick*, 1 Bank. Ct. Dec. 412 (R.I. 1974), following federal law in disregard of *East Providence Loan Co. v. Ernest*, 103 R.I. 259, 236 A.2d 639 (1968).

45. *In re Schuerman*, 367 F. Supp. 1347, 1349 (E.D. Ky. 1973). Cf. *In re Soika*, 365 F. Supp. 555 (W.D.N.Y. 1973); *In re Fuhrman*, 385 F. Supp. 1185 (W.D.N.Y. 1973) (adopting the "actual pecuniary loss" rule in part because it was the New York measure of loss in state fraud actions).

46. 400 F. Supp. 1112 (S.D.N.Y. 1975).

has been addressed."<sup>47</sup>

In *In re Shade*,<sup>48</sup> District Judge Burke of the Western District of New York relied on what he stated was "unequivocal" language in section 17(a)(2) to hold that the total amount of the new note (balance of preexisting loan plus "fresh cash") should be nondischargeable. Judge Metzner of the Southern District of New York rejected Judge Burke's interpretation in *In re McNee*,<sup>49</sup> stating that it "does not take into account the fact that . . . the debtor's monthly payments increased after the second loan from \$52.18 each month to \$56.00 each month." As a result, he said:

[t]he debtor was not getting an extended period to pay off the money originally obtained in the first loan. The extension appears to be related solely to the fresh cash received at the time the second note was signed. This was not a case of a debtor being delinquent in his payments and receiving an extension of time to pay off the loan.

It is important to note that the only reason the original loan had to be rewritten was to permit [the lender] to get the additional business and comply with [the state's small loan act]

. . . .<sup>50</sup>

In *Household Finance Corp. v. Clem*,<sup>51</sup> the court also focused on the measure of damages in a false financial statement case under section 17(a)(2). Appealing a decision by the bankruptcy judge which limited the creditor's recovery to the "fresh cash" advanced, the creditor claimed it was entitled to the total remaining balance. After declining to answer the question of whether a creditor is limited to a judgment for new money advanced when the renewal is made for the creditor's convenience, District Judge Skopil reversed the bankruptcy judge and held that "the old and new loans were consolidated because plaintiff believed it was legally obliged to do so for defendants' protection."<sup>52</sup> Since the new money was not ad-

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47. *Id.* at 1117. Compare *In re Shade*, No. Bk-73-1018 (W.D.N.Y. July 24, 1974) (Burke, D.J.) with *In re Soika*, 365 F. Supp. 555 (W.D.N.Y. 1973).

48. No. Bk-73-1018 (W.D.N.Y. July 24, 1974). In his decision, Bankruptcy Judge Hayes referred to the dichotomy which exists between the District Court Judges in the Western District of New York who have passed upon the measure of damages; District Judge Curtin in *Soika* and *Pilinko* and the late District Judge Henderson in *Fuhrman*, having adopted the "fresh cash" measure of damages, and District Judge Burke having held to the contrary in *Shade* and *Croston*. Since his decisions are appealable only to District Judge Burke, the Bankruptcy Judge quite properly stated "it would be futile for this Court to hold an opinion contrary to his."

49. 390 F. Supp. 271, 272 (S.D.N.Y. 1975).

50. *Id.* at 272-73.

51. No. 375-397, 2 Bankr. Ct. Dec. 373 (Ore. Feb. 24, 1976).

52. *Id.* at 374. The reported case record does not indicate the basis for plaintiff's belief,

vanced for the convenience of the creditor, the court felt this creditor did not fall within that class of lenders limited to a judgment for new money advanced.

Although the federal courts have not been uniform in responding to this issue, as is seen by the three preceding cases, the vast majority of decisions have adopted the approach of Judge Metzner in *In re McNee* and have limited damages to the "fresh cash."<sup>53</sup>

Perhaps the best analysis of the appropriate measure of damages in a section 17(a)(2) case was provided in *In re Fuhrman*.<sup>54</sup> Affirming the decision of the bankruptcy judge that only the new money advanced was recoverable, District Judge Henderson held that in view of the tort character of the false financial statement exception in section 17(a)(2), the correct measure of damages is the actual pecuniary loss flowing from the fraud. On the facts of the case, the court in *Fuhrman* found that the actual damage stemming from the fraud was the new money advanced.

While it should be noted that the court arrived at the pecuniary

nor does it reflect the existence of an applicable state small loan act mandating such consolidation under the circumstances.

53. In the following cases, only the new money or "fresh cash" was held nondischargeable: *Reported Cases*:

*In re Ellis*, 400 F. Supp. 1112 (S.D.N.Y. 1975), (Carter, D.J.); *In re McNee*, 390 F. Supp. 271 (S.D.N.Y. 1975), (Metzner, D.J.); *In re Fuhrman*, 385 F. Supp. 1185 (W.D.N.Y. 1973), (Henderson, D.J.); *In re Schuerman*, 367 F. Supp. 1347 (E.D. Ky. 1973), (Swinford, D.J.); *In re Soika*, 365 F. Supp. 555 (W.D.N.Y. 1973), (Curtin, D.J.); *In re Markiewicz*, No. H-75-143, 1 Bankr. Ct. Dec. 1692, (Conn. Nov. 24, 1975), (Seidman, B.J.); *In re Meyers*, No. 74-93657-B, 1 Bankr. Ct. Dec. 1651 (E.D. Mich. Oct. 29, 1975), (Brody, B.J.); *In re Barlick*, No. BK-71-310, 1 Bankr. Ct. Dec. 412 (R.I. Dec. 31, 1974), (Votolato, B.J.).

*Unreported Cases*: *In re Osofsky*, No. 75-B-1563 (E.D.N.Y. filed June 15, 1976), (Rudin, B.J.); *In re Pilinko*, No. Bk-74-285 (W.D.N.Y. filed Feb. 5, 1976), (Curtin, D.J.); *In re Stanzone*, No. 74-B-138 (E.D.N.Y. filed May 2, 1975), (Weinstein, D.J.); *In re Pezzella, Jr.*, No. 74-B-127 (N.D.N.Y. filed July 3, 1974), (Foley, D.J.); *In re Sweet*, No. B-75-289, (Conn. filed Oct. 1, 1974), (Trevethan, B.J.); *In re Webb*, No. H11134 (D. Conn. filed Jan. 31, 1973), (Seidman, B.J.); *In re Akright*, No. BG 638-72B5 (W.D. Mich. filed Apr. 13, 1973), (Benson, B.J.); *In re Andrews*, No. 71-1029-B (E.D. Mich. filed Apr. 12, 1973), (DeMascio, D.J.); *In re Simon*, No. 38259 (Conn. filed June 14, 1973), (Trevethan, B.J.); *In re Wisner*, No. 71-Bk-1678 (N.D.N.Y. June 1, 1973), (Foley, D.J.); *In re Hollencamp*, No. EV 72-B-411 (S.D. Ind. filed July 26, 1973), (Brooks, B.J.); *In re Busatt*, No. 73-B-5 (E.D.N.Y. filed July 10, 1973), (Judd, D.J.); *In re Tynan*, No. 38136 (Conn. filed Sept. 17, 1973), (Trevethan, B.J.); *In re Martin*, No. 56,865 (S.D. Ohio filed Nov. 28, 1973), (Kinneary, D.J.); *In re Ross*, No. 72-B-202 (S.D.N.Y. filed Oct. 25, 1972), (Schwartzberg, B.J.); *In re Birkholz*, No. 71-Bk-517 (W.D. Wisc. filed Nov. 4, 1971), (Doyle, D.J.); *In re Kirk*, No. 71-1017D (S.D. Ohio 1971), (Anderson, B.J.); *In re Wolf*, No. 71-8115 (E.D. Ky. 1971), (Lee, B.J.).

See Lee, *supra* note 42. *Contra* Household Finance Corp. v. Clem, No. B75-397, 2 Bankr. Ct. Dec. 373 (Ore. Feb. 24, 1976), (Skopil, D.J.); *In re Turner*, No. BK-74-502, unreported (W.D.N.Y. Jan. 6, 1975), (Hayes, B.J.); *In re Shade*, No. Bk-73-1018, unreported (W.D.N.Y. July 24, 1974), (Burke, D.J.); *In re Croston*, No. BK-46108, unreported (W.D.N.Y. Feb. 8, 1962), (Burke, D.J.).

54. 385 F. Supp. 1185 (W.D.N.Y. 1973).

loss test by applying its state law rule, it is clear that the court was not rejecting the concept of a national dischargeability policy. On the contrary, the court stated:

We start with the premise that "the basic purpose of the Bankruptcy Act [is] to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' . . ."<sup>55</sup>

Only after noting that the Congress had not laid down a specific dischargeability test did the court apply state law.

The "actual pecuniary loss" test arrived at by the *Fuhrman* court provides a more useful and equitable basis for determining dischargeability within the context of the federal "fresh start" policy. The many factors which have previously been considered on a piecemeal basis in reaching "fresh cash" decisions could be more easily dealt with in the framework of a test based on the "actual pecuniary loss" flowing from the fraud. These factors include: (a) whether the lender relied upon the false financial statement in refinancing the prior loan, and hence whether the refinancing was "obtained" by the statement within the purview of section 17(a)(2);<sup>56</sup> (b) whether the refinancing was obtained at the behest of the bankrupt, or whether the refinancing was instead coerced by provisions of small loan acts adopted by many states<sup>57</sup> which prohibit the granting of several loans to the same person in order to obtain a higher interest rate; (c) whether the refinancing was for the convenience of the lender and consequently not "obtained" by the bankrupt borrowers;<sup>58</sup> (d) whether the debtor's monthly payments increased after the second loan;<sup>59</sup> and (e) whether the old and new loans were consolidated because the creditor believed it was legally obliged to do so for the bankrupt's protection.<sup>60</sup>

While many courts have utilized one or more of these factors in reaching a decision as to the appropriate damages in a section 17 (a)(2) case, no court has systematically analyzed all of them in the

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55. *Id.* at 1186, citing *Lines v. Frederick*, 400 U.S. 18, 19 (1970).

56. *In re McNee*, 390 F. Supp. 271 (S.D.N.Y. 1975). *In re Stanzione*, No. 74-B-138 (E.D.N.Y. filed May 2, 1975).

57. "Under the laws of most states statutory limitations on the rate of interest chargeable by small loan companies dictate that new loans must be consolidated with existing loans when additional credit is extended, because such companies cannot have two loans in effect with one individual at the same time without violating restrictions on interest charges." Lee, *supra* note 42, at 246.

58. *In re Stanzione*, No. 74-B-138 (E.D.N.Y. May 2, 1975).

59. *In re McNee*, 390 F. Supp. 271 (S.D.N.Y. 1975).

60. *Household Fin. Corp. v. Clem*, No. 375-397, 2 Bankr. Ct. Dec. 373 (Ore. Feb. 24, 1976).

context of determining the actual pecuniary loss stemming from the false financial statement. Such a systematic analysis would do much to assure the equitable application of the federal "fresh start" policy in false financial statement cases.

As the court suggested in *Fuhrman*, those who argue whether "fresh cash" or "total indebtedness" is the correct measure of damages miss the point. Rather, the "fresh cash" concept should be used as a limiting yardstick for the measure of damages in a section 17 (a)(2) false financial statement case, and to that extent, serve only as another factor to ensure the honest bankrupt's "fresh start."